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ALEXANDER L. STEVAS,
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(3)

No. 84-1302

In The

Supreme Court of the United States

October Term, 1984

SHELL OIL COMPANY,
Petitioner,

vs.

THE PINEY WOODS COUNTRY LIFE SCHOOL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Notwithstanding Petitioner's opening comment, this case is simply one in which a civil litigant, disappointed over the Court of Appeals' application of state law to the construction of a private contract, seeks review and redress by this Court by raising an alleged hypertechnical procedural defect under Rule 54(b). This is not a proper case for the issuance of a Writ of Certiorari. Shell's petition is simply a last-ditch effort, after ten years of litigation in the District Court and the Court of Appeals, to get this Court to somehow provide it with further delay from facing the judgment which is now inevitable.

JURISDICTION

The basis for jurisdiction asserted by Shell is improper. There is no basis for jurisdiction for this Petition for Writ of Certiorari. Shell totally fails to assert

any special or important reason for this Court's review as required by Supreme Court Rule 17.

STATEMENT OF THE CASE

This action involves Shell's contracted obligation under oil and gas leases to pay royalties based upon the current market value of gas despite the fact that Shell made an imprudent long-term gas contract with a third party to sell the gas at a much lower price. The case was thoroughly litigated in a lengthy trial which resolved every claim except one very minor claim involving an insignificant amount of gas. The District Court properly certified the decided claims for appeal under Rule 54(b), and the Court of Appeals, after holding that its jurisdiction was proper under Rule 54(b), proceeded to resolve all certified claims and issues that were properly before it.

This action was filed in 1974 and was tried on its merits in November and December of 1979, resulting in an exhaustive reported trial court decision (App. A) rendered on May 6, 1982. In its decision, the trial court denied all the Plaintiff's major claims and determined all the controlling legal principles. It then certified the decided claims for appeal and made detailed specific findings in support of the certification. (App. E).

Over Shell's objection, the Fifth Circuit Court of Appeals determined that it did have jurisdiction and found that the trial court had acted properly by certifying the claims specified for appeal pursuant to Rule 54(b). The court's specific ruling on this point is as follows:

> [1] Shell argues that we do not have jurisdiction over this appeal, on the ground that the claims not decided are inseparable from those certified. This is plainly incorrect. The district court's decision effectively disposed of all the issues except the amount of extra royalty owed by Shell. Litigation remains on only one claim, the royalties due on off-lease use of gas by Shell. One fact--the market value of gas—is relevant to several claims, but this does not make the claims inseparable. Alternatively, Shell argues that the district court abused its discretion in certifying the appeal. This contention is meritless. The only thing left for the plaintiffs to do in the district court is to present lengthy evidence on the market value of the small amount of gas Shell used in off-lease operations. The plaintiffs' potential recovery would not justify the expense of this proof. We think that the district court acted wisely and in the interests of "sound judicial administration" in certifying the case at this stage. See Curtiss-Wright Corp. v. General Electric Co., 1980, 446 U.S. 1, 9, 100 S.Ct. 1460, 64 L.Ed.2d 1, 12; Skinner v. W.T. Grant Co., 5 Cir.1981, 642 F.2d 981, 983-84.
>
> Shell also argues that the certification reserves some issues other than the amount of Shell's liability on the off-lease use claim—for example, whether "market value" means "current market value" in the context of sold gas as well as used gas. We understand this appeal to present all the issues except two factual questions: the market value of the gas and the amount of gas for which royalties are due.

[App. B at A85-86].

The Court disposed of the seven claims presented (App. F) as follows: It found that claims 1 and 3 were not raised on appeal. It affirmed claims 6 and 7. It affirmed in part and remanded in part claim 2. It reversed and remanded claims 4 (a claim for "gas sold") and 5 (a claim for "gas used") which are as follows:

4. Plaintiffs' claim for damages and injunctive relief for Defendant's alleged breach of its express duty, under applicable leases, to pay royalty based on market value on gas sold off the leased premises.

5. Plaintiffs' claim for damages and injunctive relief for Defendant's alleged breach of its express duty under the applicable leases, to pay royalty based on market value for all gas used off the leased premises as plant fuel.

The basis for the court's reversal on point 4 was its determination that the gas was "sold off the leased premises". It arrived at this conclusion after reviewing the pertinent facts (App. B at A84) and the Mississippi Supreme Court decision *State ex rel. Patterson v. Pure-Vac Dairy Products Corp.*, 251 Miss. 472, 170 So.2d 274 (Miss. 1964), *appeal dismissed*, 382 U.S. 14 (1965). The court found that *Pure-Vac* established the controlling principle, under Mississippi law, as to the point of sale. (App. B at A92)

RESPONSE TO SHELL'S REASONS FOR GRANTING THE WRIT

Shell, at both the District Court and Court of Appeals levels, objected to 54(b) certification. Now it has abandoned that argument and focuses on whether the Court of Appeals' consideration of the phrase "market value" was appropriate.

Shell's basic argument is that the consideration by the Court of Appeals of the meaning of "market value" and the method of proving market value was improper, because these issues supposedly related only to the uncer-

tified non-final claim relating to off-lease fuel. A review of the trial court's decision reveals that its consideration of the phrase "market value" encompassed market value of gas sold as well as gas used (App. A at A49-59). In fact, all of the authorities relied upon by the District Court involved gas sold. It is also apparent that the phrase "market value" and the proof of market value is relevant to claims 4 (gas sold) and 5 (gas used) which were specifically certified (App. F at A126).

The Court of Appeals expressly disagreed with Shell's assertion that the District Court's discussion of the meaning of "market value" related only to gas used:

> Shell, however, contends that the district court's definition of market value applies only to "used" gas, not to "sold" gas. We see nothing in the district court's opinion to suggest this result, and we reject Shell's argument that "market value at the well" has different meanings in different clauses of the same sentence.

(App. B at A93).

The court recognized that the discussion of market value necessarily related directly to the certified final claims of gas sold and gas used as plant fuel and were, therefore, properly before the court for consideration at that time. It was also apparent that the determination of the meaning of market value was "fundamental to the further conduct of the case". *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). Even if the issues had not been properly before the Court of Appeals, their consideration by the court at that time was consistent with this Court's ruling that the "requirement of finality is to be given a practical rather than a technical construction".

Id. at 152. Therefore, the court's consideration of this issue was in keeping with the usual course of judicial proceedings and the exercise of sound judicial administration.

CONCLUSION

Shell has had its day in court. In fact, it has had over ten years in court in which it his exhaustively briefed every point imaginable. There was a lengthy trial with extensive evidence presented by both sides and an appeal in which all of the controlling legal issues were carefully considered after extensive briefing by the litigants. It is now time for this litigation to come to an end. The petition should be denied.

Respectfully submitted,

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